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No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, APPELLANT

v.

HARRY M. WURZBACH

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 8) is reported in 31 F. (2d) 774.

JURISDICTION

The judgment to be reviewed was entered on March 23, 1929. (R. 7.) Appeal to this Court was petitioned for, and allowed on April 4, 1929. (R. 12–13.) The jurisdiction of this Court rests upon the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C.

Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

On October 28, 1929, this Court announced that it found that probable jurisdiction had been shown.

QUESTION PRESENTED

The sole question presented is whether Section 118 of the Criminal Code as amended by Section 312 of the Corrupt Practices Act of February 28, 1925, which, among other things, forbids a Representative to receive or be concerned in receiving contributions from officers or employees of the United States for any political purpose whatever, applies to a Representative who receives such a contribution to be used only in the promotion of his candidacy in a primary election, and, if so, whether the statute is for that reason unconstitutional.

STATUTE INVOLVED

Section 312 of the Corrupt Practices Act of February 28, 1925, c. 368, 43 Stat. 1053, 1073 (U. S. C. Title 18, Sec. 208), which amended in certain particulars Section 118 of the Criminal Code, reads as follows:

> It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from

> money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

Section 118 of the Criminal Code of the United States in its original form read as follows:

> No Senator or Representative in, or Delegate or Resident Commissioner to Congress, or Senator, Representative, Delegate, or Resident Commissioner elect, or officer or employee of either House of Congress, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch, or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.

STATEMENT

Appellee, a Representative in Congress, was indicted in the District Court of the United States for the Western District of Texas. The indictment

was in six counts and charged him with receiving and being concerned with receiving political contributions from named officers and employees of the United States, said contributions being for the purpose of promoting the candidacy of appellee in a primary election. (R. 1–5.) He thereupon filed a motion to quash the indictment on the ground that the acts charged did not constitute a violation of any law of the United States. (R. 6.) This motion was sustained (R. 7), the court saying:

> * * * the court, * * * is of the opinion that said motion should be sustained on the grounds that the words "for any political purpose whatever," as used in section 208 of the United States Criminal Code Annotated, were not intended by Congress to include the political purpose named in the indictment, which reads as follows:
>
> "for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the fourteenth congressional district of Texas."
>
> and if Congress did intend that the words "for any political purpose whatever" should cover the political purpose mentioned in the indictment, then that the statute in question to that extent is probably unconstitutional,
> * * *

In its opinion, later filed (R. 8), the court stated its conclusions as follows (R. 12):

That the act in question being penal in character and uncertain and doubtful meaning, such doubts will be construed to the benefit of the defendant.

That the political purpose specified in the indictment for which defendant is charged to have received is for a State political purpose and not a Federal one.

That section 208, Criminal Code, title 18, U. S. C. A., is expressed in general terms that embrace contributions for political purposes within the field of legislative authority, as well as outside thereof, and to the latter extent is probably unconstitutional.

The court in its opinion also said that the statute was ambiguous and uncertain, but that conclusion appears to have been reached because the statute was broad enough on its face to cover political contributions for either Federal or State purposes, and the court was of the opinion that the statute, to be constitutional, should have been so framed as to show definitely that it covered only political contributions to be used for Federal purposes. It seems clear from the opinion that no ambiguity or uncertainty in the statute would have been found had the court been convinced that the power of Congress to enact the statute was broad enough to prohibit the giving and receiving of political contributions as referred to in the statute, regardless of whether such contributions were made for a Federal or State political purpose.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In quashing the indictment.

(2) In holding that Section 312 of the Corrupt Practices Act of February 28, 1925, although broad enough to cover political contributions for either Federal or State purposes, must be construed as restricted to such contributions for Federal purposes only, because a broader construction would render it unconstitutional.

SUMMARY OF ARGUMENT

While the statute upon which the indictment is founded is a criminal statute, no rule of construction forbids giving to the language its full meaning where that construction subserves the policy and purposes of the statute.

While analogous statutes have been before the courts, no other decision has suggested that the words "political purpose" must be limited to Federal political purposes because of any supposed lack of constitutional power on the part of Congress to forbid contributions made for a State political purpose.

The purpose of the legislation here involved is "to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." Such purpose would be just as much frustrated by the receiving of a political contribution for use in a primary election as it would be by receipt of such a contribution for use in a general election.

The decisions plainly indicate that such legislation does not rest upon the limited power over elections conferred upon Congress by the Constitution, and the cases of *Newberry* v. *United States*, 256 U. S. 232, and *United States* v. *Gradwell*, 243 U. S. 476, relied upon by the court below, are not controlling.

There is nothing in the legislative history incorporating old Section 118 of the Criminal Code in the Corrupt Practices Act of 1925 which discloses any purpose to alter the scope of the old law.

ARGUMENT

THE LANGUAGE OF THE STATUTE IS SUFFICIENTLY BROAD TO COVER POLITICAL CONTRIBUTIONS FOR USE IN PRIMARIES, AND AS SO CONSTRUED IS CONSTITUTIONAL

Unless the statute under consideration and its history disclose an intention to restrict the scope of the words "for any political purpose whatever," the words must be accorded their ordinary meaning. It is true that the statute is a criminal one, but, as said by this Court in *Donnelley* v. *United States*, 276 U. S. 505, 512:

> The rule that penal statutes are to be strictly construed in favor of persons accused is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment. *United States* v. *Hartwell*, 6 Wall. 385, 395. *United States* v. *Wiltberger*, 5 Wheat. 76, 95.

See also *United States* v. *Alford,* 274 U. S. 264, 267.

The words "for any political purpose whatever" have been in the statute since the original Act of January 16, 1883, c. 27, Sec. 11, 22 Stat. 403, 406. Similar language has been used in other Acts, and up to the time of the decision below no court had suggested that there was any political purpose which it did not cover.

United States v. *Curtis,* 12 Fed. 824, 106 U. S. 371, arose under the Act of August 15 1876, c. 287, Sec. 6, 19 Stat. 143, 169 (U. S. C., Title 18, Sec. 213), which forbade one officer from requesting, giving to, or receiving from any other officer any money, property, or other thing of value "for political purposes." The indictment merely charged that the contribution was received "for the use of the Republican state committee." It was argued in the trial court that the statute was invalid because not limited to political contributions for *Federal political purposes,* and also that the indictment alleged no such *Federal purpose.* On motion for new trial and arrest of judgment the Circuit Court said (pp. 838–839):

> It is insisted for the defendant that it is not within the constitutional power of congress to make the giving or requesting or receiving of a voluntary contribution for political purposes by a subordinate government official a criminal offence. It will be observed, however, that the prohibition applies only when there is concerted action between

officials in this behalf. The question, then, is whether it is competent for congress to prohibit co-operation between officials in the raising of funds for political purposes. Undoubtedly, it is lawful for congress to prescribe all needful regulations for the discipline of government officials, and to declare what infractions of discipline shall be treated as criminal offences. The power to prohibit acts of officers or employes which are incompatible with the proper discharge of their duties, or which impair the efficiency or tend to demoralize the public service, is essential to promote the end and object of government; and this power resides in the legislative department of the government. In executing this power congress must of necessity exercise its judgment and discretion in determining what acts are or are not of such a pernicious character and tendency. This legislative discretion embraces a large field, and its boundaries can not always be readily located. It is only when congress has palpably transgressed the limits of its discretion that the judicial departments will intervene. Such a case might arise if congress should attempt to prohibit an act of a nature pertaining so exclusively to the sphere of private conduct that it could not, by any implication, impinge upon official deportment or official discipline. We are not able to say that the acts prohibited by the present statute are of such a character. We can not affirm that congress transcended its discretion in prohibiting

> transactions between officials which create the relation of donor and donee, and introduce party interests into the public service; nor that congress erred in assuming that the influences springing from this relation and these interests should be discouraged as liable to deflect the independence and impartiality which must rule official intercourse. * * * It is sufficient to justify the exercise of the legislative discretion if the prohibited acts tend to introduce interests which disturb the just equipose of official relations.

Curtis thereupon sought a writ of habeas corpus from this Court, but it was refused. In disposing of the case this Court said (106 U. S. pp. 371–374):

> The act is not one to prohibit all contributions of money or property by the designated officers and employes of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges.
>
> That the government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions; but express authority is given Congress by the Constitution to make all laws necessary and proper to carry into effect the powers that are delegated. Art. 1, sect. 8. Within the

legitimate scope of this grant Congress is permitted to determine for itself what is necessary and what is proper.

The act now in question is one regulating in some particulars the conduct of certain officers and employes of the United States. It rests on the same principle as that originally passed in 1789 at the first session of the first Congress, which makes it unlawful for certain officers of the Treasury Department to engage in the business of trade or commerce, or to own a sea vessel, or to purchase public lands or other public property, or to be concerned in the purchase or disposal of the public securities of a State, or of the United States (Rev. Stat., sect. 243); and that passed in 1791, which makes it an offence for a clerk in the same department to carry on trade or business in the funds or debts of the States or of the United States, or in any kind of public property (id., sect. 244); and that passed in 1812, which makes it unlawful for a judge appointed under the authority of the United States to exercise the profession of counsel or attorney, or to be engaged in the practice of the law (id., sect. 713); and that passed in 1853, which prohibits every officer of the United States or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the Senate or House of Representatives, from acting as an agent or attorney for the prosecution of any claim against the

United States (id., sect. 5498); and that passed in 1863, prohibiting members of Congress from practising in the Court of Claims (id., sect. 1058); and that passed in 1867, punishing, by dismissal from service, an officer or employe of the government who requires or requests any workingman in a navy-yard to contribute or pay any money for political purposes (id., sect. 1546); and that passed in 1868, prohibiting members of Congress from being interested in contracts with the United States (id., sect. 3739); and another, passed in 1870, which provides that no officer, clerk, or employe in the government of the United States shall solicit contributions from other officers, clerks, or employes for a gift to those in a superior official position, and that no officials or clerical superiors shall receive any gift or present as a contribution to them from persons in government employ getting a less salary than themselves, and that no officer or clerk shall make a donation as a gift or present to any official superior (id., sect. 1784). Many others of a kindred character might be referred to, but these are enough to show what has been the practice in the Legislative Department of the government from its organization, and, so far as we know, this is the first time the constitutionality of such legislation has ever been presented for judicial determination.

The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of offi-

cial duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end. It is true, as is claimed by the counsel for the petitioner, political assessments upon office-holders are not prohibited. The managers of political campaigns, not in the employ of the United States, are just as free now to call on those in office for money to be used for political purposes as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employes. What we are now considering is not whether Congress has gone as far as it may, but whether that which has been done is within the constitutional limits upon its legislative discretion.

A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the

> personal displeasure of a superior, as to promote the political views of the contributor,—to avoid a discharge from service, not to exercise a political privilege.

United States v. *Thayer,* 209 U. S. 39, arose under Section 12 of the Act of 1883, *supra,* which Act also contained, in Section 11 thereof, the provision subsequently incorporated in the Corrupt Practices Act under which the indictment in the case at bar was drawn. Section 12 forbade the receipt or solicitation in any Government office of any contribution "for any political purpose whatever." The indictment in the *Thayer case* (154 Fed. 508, 509) charged a solicitation by letter for a contribution to be used in conducting the Republican State campaign in the State of Texas, and also furthering the interests of the Republican party in the State. The only attack made upon the indictment was that the solicitation was by letter which it was contended was not within the reach of the statute. This Court held that the words of the statute must be given their full scope in order to effectuate its purpose, saying (p. 42):

> It appears to us no more open to doubt that the statute prohibits solicitation by written as well as by spoken words. It forbids all persons to solicit "in any manner whatever." The purpose is wider than that of a notice prohibiting book peddling in a building. It is not, even primarily, to save employes from interruption or annoyance in

> their business. It is to check a political abuse, which is not different in kind, whether practiced by letter or by word of mouth.

Having in mind the purpose of such legislation as is here involved, as pointed out by this Court in the *Curtis case* (*supra*), it follows that the receipt by a Representative in Congress, of contributions from a government official, to promote the Representative's candidacy *in a primary election,* as charged in the indictment at bar would frustrate that purpose, quite as much as the receipt of a political contribution to be used to promote his candidacy at a general election. Such a contribution, so received, would manifestly be "for any political purpose whatever." As was said by this Court in *Donnelley* v. *United States,* 276 U. S. 505, 518:

> The construction contended for by defendant unduly restrains the language of the clause in question, is inconsistent with the context and contrary to the purposes of the Act and the policy of Congress. It is without substantial support and can not be sustained.

Indeed, the trial court expressly found that the contribution received by the appellee was "a contribution for a political purpose." (R. 8.) The limited construction placed on the statute by the trial court is not in harmony with the intention of Congress. And the broader construction for which we contend is well within its constitutional

powers. The error in the trial court's ruling to the contrary results from its assumption that power to enact the statute is to be found only in that provision of the Constitution conferring upon Congress a limited control over elections of Senators and Representatives, viz Article I, Section 4. The decisions, *supra,* are otherwise, and the cases of *Newberry* v. *United States,* 256 U. S. 232, and *United States* v. *Gradwell,* 243 U. S. 476, relied upon by the court below, do not require a contrary holding.

The *Newberry case, supra,* arose under the Act of June 25, 1910, as amended by the Act of August 19, 1911 (statute set forth 256 U. S. 232, 243), which attempted to put a limitation upon the amount which a candidate for Senator or Representative might give or expend in procuring his nomination and election. This was an attempt to control conduct with respect to nomination and election of candidates who had no official relation with the Government. Such legislation was to be supported, if at all, by Section 4, Article I, of the Constitution, which conferred upon Congress the power to alter such regulations as the States might make regarding the *times, places,* and *manner* of holding elections for Senators and Representatives. This Court held that such provision did not cover primary elections.

The *Gradwell case, supra,* merely held that the Federal conspiracy statute, because of its history,

was not applicable to acts committed in connection with a primary election, and further that such rights as a candidate for Senator or Representative had in a primary election were derived not from the Federal Constitution but from State laws. This Court left undecided in that case the question "what power Congress would have to make regulations for nominating primaries or to alter such regulations when made by a State" (p. 488).

These two cases are clearly distinguishable from the case at bar in that they represented attempts to deal with elections as such, and therefore must rest upon the limited constitutional power of Congress over that subject, while in the case at bar the end sought is, to quote from the *Curtis case, supra,* 106 U. S. 371, 373, "to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." This is an end, as heretofore shown, well within the constitutional power of Congress.

In its opinion herein the trial court compared political rights with political purposes, suggesting (R. 8) that participating in the establishment or management of the Government was a political right, but overlooking the fact that the purpose of the statute was not to control appellee's right *to participate in the election,* but to protect the integrity and efficiency of the Federal service by forbidding appellee from soliciting or receiving the inhibited contribution from an employee therein.

The Act is not intended to control primary elections. It is intended to prevent certain intercourse with a government official, which intercourse might reasonably tend to destroy his faithfulness or efficiency in office. The Act does not affect the primary election, or the appellee's right to participate therein. It simply forbids appellee from participating in certain acts with a paid government employee, which acts Congress has determined are against the best interest of the Government. The statute is directed at contributions for *any* political purpose, because the evil effect on the employee is presumably the same, regardless of what the political purpose may be. The Government must be held to have full power to throw such safeguards around its employees, as, in the opinion of Congress, may be necessary to promote their faithfulness and reliability. The power is thus brought directly within the provisions of Article I, Section 8 of the Constitution, as held by this Court in the *Curtis case, supra.*

In connection with an attack upon a statute forbidding a member of Congress from receiving compensation for services rendered before a department of the Government, this Court, in *Burton* v. *United States,* 202 U. S. 344, 367–368, said:

> In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several Departments, Congress, having a choice of means, may prescribe

such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law. It possesses the entire legislative authority of the United States. By the provision in the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States," it is meant that Congress—keeping within the limits of its powers and observing the restrictions imposed by the Constitution—may, in its discretion, enact any statute appropriate to accomplish the objects for which the National Government was established. A statute like the one before us has direct relation to those objects, and can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator. * * * Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the Government whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. * * * There can be no reason why the Government may not, by legislation, protect each Department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. * * * If that which is enacted in the form of a statute is within the general sphere of legitimate

> legislative, as distinguished from executive and judicial, action, and not forbidden by the Constitution, it is the supreme law of the land—supreme over all in public stations as well as over all the people. "No man in this country," this court has said, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

No argument seems necessary to demonstrate the ample basis for the action of Congress in naming, among others, a representative in Congress as one of the persons forbidden to solicit or receive contributions for political purposes from other government employees. The close connection between the government employees and Members of Congress suffices to show the possibility that the soliciting or receiving of political contributions from the employee by the Member of Congress might open the door to the precise evils which statutes of this sort are intended to prevent.

Nor is there anything in the legislative history of the Corrupt Practices Act of 1925, *supra,* indicating that, by incorporating therein Section 118 of the Criminal Code, there was any purpose to alter the previously existing scope of that section. The Bill which ultimately became the Corrupt Practices Act appears to have been prepared by Representative Cable, Chairman of the House Committee on

Election of President, Vice President, and Representatives in Congress, and that Committee, in reporting out the Bill, said (House Rep. 721, 68th Cong., 1st sess.):

> The existing law regulating corrupt practices in elections has been enacted in piecemeal fashion and consists of six separate acts of Congress passed, respectively, in 1907, 1909, 1910, 1911, 1912, and 1918. These laws are in part antiquated because of additional amendments to our Constitution. They are unconstitutional in part because of the decision of the United States Supreme Court in the Newberry case. They handicap the honest candidate through certain limitations which were enacted before the number of voters was doubled by the adoption of the nineteenth amendment. The law fails to require proper publicity of contributions made between elections, and thus huge contributions, given oftentimes with the hope of a reward or favor, are not reported. H. R. 8956 represents an attempt to make an orderly revision of the existing law, eliminate its uncertainties and unconstitutional portions, and add provisions deemed necessary to cure defects in the present statutes.

See also Cong. Rec. Vol. 65, Pt. 9, p. 9516; *id.* Pt. 10, pp. 10327–10329; *id.* Pt. 11, p. 10651; and Vol. 66, Pt. 4, p. 3662.

There is no suggestion in this legislative history of any purpose to change the previously existing scope of Section 118 of the Criminal Code, under

which, as amended, the indictment at bar was framed. In such case the rule of interpretation to be applied is that stated in *McDonald* v. *Hovey,* 110 U. S. 619, 629, viz.:

> So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedgwick on Const. Stat. 365. As said by the New York Court for the Correction of Errors, in *Taylor* v. *Delancey,* 2 Caines' Cas. 143, 150:
>
> "Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change." And see *Yates' Case,* 4 Johns. 317; *Theriat* v. *Hart,* 2 Hill, 380; *Parmelee* v. *Thompson,* 7 Hill, 77; *Godell* v. *Jackson,* 20 Johns. 693; *Croswell* v. *Crane,* 7 Barb. 191. "The construction will not be changed by such alterations as are merely designed to render the provisions more precise." *Mooers* v. *Bunker,* 29 N. H. 421.

See also *Heald* v. *District of Columbia,* 254 U. S. 20, 23.

CONCLUSION

The language of the statute here involved is sufficiently broad to cover the charge laid in the indict-

ment against the defendant, and as the statute so construed is well within the constitutional power of Congress, it is respectfully submitted that the judgment below should be reversed.

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